IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989 89-5916

No. _____

RICHARD S. DEMAREST,

Petitioner,

v.

JAMES MANSPEAKER, ET AL,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Richard S. Demarest, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has previously geen granted leave to so proceed in both the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit.

Petitioner's affidavit in support of this motion is attached hereto.

Dated: October 25, 1989

Respectfully submitted,

Richard S Demarest

Richard S. Demarest
Petitioner, pro se
Register 48201
Box 1000 AVCF Unit 1-C
Crowley, CO 81034

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Richard S. Demarest being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on certiorari to the Tenth Circuit Court of Appeals without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of bringing certiorari are true.

1. Are you presently employed? YES I am employed as a clerk at the Arkansas Valley Correction Facility of the Colorado Department of Corrections, Crowley, Colorado and receive approximately $40.00 per month in compensation.

2. Have your received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? YES I have received birthday gifts totaling approximately $70.00.

3. Do you own any cash or checking or savings account? YES I have a prison account wherein approximately $24.00 is on deposit.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Barbara Bruneau -- Former Spouse
Bradley Michael Demarest -- Natural Son by Marriage

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Richard S. Demarest
Petitioner, pro se
Register 48201
Box 1000 AVCF Unit 1-C
Crowley, CO 81034

Subscribed and sworn to before me this 25th day of October, 1989.

Allen McGrath -- Notary Public
Box 1000
Crowley, CO 81034

My commission expires: May 24, 1992

No. 89-5916

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Richard S. Demarest
Register 48201
Box 1000 A.V.C.F. Unit 1-C
12750 Hwy. 96, Lane 13
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(719) 267-3520

PETITIONER, PRO SE

QUESTIONS PRESENTED FOR REVIEW

IS A MATERIAL WITNESS WHO IS A CONVICTED FELON -- IN PHYSICAL CUSTODY IN A STATE OR FEDERAL PRISON -- ENTITLED TO THE SAME WITNESS FEE ALLOWANCE AS IS A MATERIAL WITNESS WHO IS NOT A CONVICTED FELON, BUT OTHERWISE DETAINED, PURSUANT TO 28 U.S.C. 1821(a)(1) and (b)?

PARTIES TO THIS PROCEEDING

The only other party not listed in the caption is the Respondent Clerk of the District Court for the District of Colorado whose first name is Cathy and whose true last name is unknown to Petitioner. Joined co-appellants in the Court of Appeals for the Tenth Circuit were Edgar Lee Durre, Ronald Reece and Elizabeth Durre, parties whose intention as to certiorari review are unknown to Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Richard S. Demarest, pro se, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit where he, an inmate witness in a federal trial, was denied statutorily mandated compensation for his presence.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado (App. "A") is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (App. "B") is reported at ___ F.2d ___.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (App. "B", majority at 7) was entered on September 5, 1989. A timely filed petition for rehearing (App. "C") was denied

on October 23, 1989. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Chapter 119 of Title 28, United States Code, Judiciary and Judicial Procedure, as amended May 10, 1949, c. 96, 63 Stat. 65; May 24, 1949, c. 139, sec. 94, 63 Stat. 103; October 31, 1951, c. 655, sec. 51(a), 65 Stat. 727; September 3, 1954, c. 1263, sec. 45, 68 Stat. 1242; August 1, 1956, c. 826, 70 Stat. 798, codified at 28 U.S.C. 1821 (1966) ed., in relevant part (full text set forth in Appendix "D", infra):

> ... Witnesses who are not salaried employees of the Government and who are not in custody ...
>
> When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his substance, to a compensation of $1 per day.

2. Chapter 119 of Title 28, United States Code, Judiciary and Judicial Procedure, as amended May 10, 1949, c. 96, 63 Stat. 65; May 24, 1949, c. 139, sec. 94, 63 Stat. 103; October 31, 1951, c. 655, sec. 51(a), 65 Stat. 727; September 3, 1954, c. 1263, sec. 45, 68 Stat. 1242; August 1, 1956, c. 826, 70 Stat. 798; March 27, 1968, Pub.L. 90-274, sec 102(b), 82 Stat. 62; October 27, 1978, Pub.L. 95-535, sec. 1, 92 Stat. 2033, codified at 28 U.S.C. 1821 (1966) ed., (1988) Cum.Supp., in relevant part (full text set forth in Appendix "E", infra):

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> (d)(1) A subsistence allowance shall be paid to any witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such

> place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
>
> (4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.
>
> (e) An alien who has been paroled into the United States for prosecution pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

3. Chapter 119 of Title 28, United States Code, Judiciary and Judicial Procedure, as amended September 2, 1965, Pub.L. 89-162, 79 Stat. 618; November 14, 1986, Pub.L. 99-651, Title I, sec. 104, 100 Stat. 3645, codified at 28 U.S.C. 1825 (1966) ed., (1988) Cum.Supp., in relevant part (full text set forth in Appendix "F", infra):

> (a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district --
>
> > (2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

STATEMENT OF THE CASE

After testifying as a defense witness in a federal criminal trial, petitioner, a confined state inmate, requested that the clerk of the court prepare certification pursuant to 28 U.S.C. 1825(a)(2) and forward same to the United States Marshal for payment of daily

witness fees pursuant to 28 U.S.C. 1821(a)(1) and (b). The trial in which petitioner testified had the United States as a party and the defendant represented by counsel appointed pursuant to 18 U.S.C. 3006A.

Petitioner was one of several state inmates brought under Writ of Habeas Corpus ad Testificandum from various Colorado state prison facilities to testify at the federal trial, but was the only inmate called having no involvement in or knowledge of the charged crime: his testimony concerned matters apart from the actual crime as stipulated by the United States Attorney in open court.

The certification was not perfected and petitioner filed a "Petition for Review of Acts and Omissions of Clerks of the District Court or, in the Alternative, Complaint for Relief in the Nature of Mandamus" in the federal district court. In denying the petition and dismissing the complaint, Chief Judge Sherman G. Finesilver cited three non-dispositive federal appellate court rulings as supporting his determination of the issue. (App. "A", pp. 1-2).

Timely notice of appeal was filed on the final order of the district court and petitioner filed his opening brief while three other state inmates, also called as witnesses in the same federal proceeding, additionally filed independent appeals and briefs on the their own denials of witness fee claims.

By a 2-to-1 margin, the Tenth Circuit affirmed the lower court's decision and expanded on the issue by interpretation of statute.

(App. "B", majority pp. 1-7). In a sharply worded dissent, objection was made to interpretation of a statute that was without ambiguity and upon an issue the general context of which had been substantially determined by this Court in 1973. (App. "B", dissent pp. 1-7).

A subsequent Petition for Rehearing was filed and denied. (App. "C", p. 1).

Federal jurisdiction in the court of first instance was pursuant to 28 U.S.C. 1331.

REASONS FOR GRANTING THE PETITION

Here, as in Hurtado v. United States, 410 U.S. 578 (1973), the issue of witness fees for the incarcerated witness is again before the Court. In this case however, the question is whether the incarcerated witness who is specifically a convicted felon in the physical custody of a state or federal prison, and not merely a witness incarcerated by inability to make a bond, is entitled to the same witness fee compensation as the latter pursuant to 28 U.S.C. 1821(a)(1) and (b).

Subsections (a)(1) and (b) of title 28 U.S.C. 1821 are clear in their language and unambiguous yet previously interpreted as excluding convicted felon/inmates from witness fees by the Third, Fifth, Eleventh Circuits, the Court of Claims, and most recently in the Tenth Circuit against the petitioner.

Erroneous interpretations of 28 U.S.C. 1821 as they apply to prisoners will continue to arise due in part to the increased literacy among America's burgeoning prison populations where society's litigious nature places more and more inmates in the witness dock with each passing day. As recently observed,

> [t]he galloping growth in the number of prisoners in the United States continues to gain speed, and there is no end in sight. In the first half of 1989, the nation's prison systems grew by 46,004 inmates -- a six month increase of 7.3 percent that put 673,565 men and women in state and federal custody.

Strasser & Kaplan, Washington Brief, Nat'l L.J., September 25, 1989, at 27, col.3.

Some 3.4 million persons, two percent of this nation's population, are under some form of correctional control. Nat'l L.J., August 7, 1989, (Supplement--CRIME IN AMERICA), at S4, col.2.

It is therefore incumbent on this Court to clarify the statute and answer the question of whether a convicted felon/inmate is precluded from witness fees despite the plain language of statute.

This Court held in 1973 that persons unable to make bond to assure personal appearance as a material witness were entitled to witness fees, not only for that time actually involved in giving testimony, but also during such time as being held "when there is a court in session that he is to attend, and when he is in necessary attendance on that court." Hurtado, supra at 583. The Court, however, left open the question of entitlement to the fees prescribed by statute when s/he is a convicted felon/inmate.

Petitioner's claim was predicated on the determination by this Court that "[t]he statute provides [$30] per diem compensation to a witness who is in necessary attendance on a court, but that fee is payable to any witness, incarcerated or not." Hurtado, supra. at 590. (emphasis added).

Since the Court's 1973 decision, the Congress modified the amount of compensation in question from $20.00 per day to $30.00 per day without qualification or definition as to convicted felon/inmate entitlement. In the 1978 reorganization, no exclusions were made as to the convicted felon that was incarcerated in a penal facility at the time called to witness. In pertinent part, 28 U.S.C. 1821 in its text on August 1, 1956, comprised two paragraphs. Language within the first paragraph considering custodial status said:

> ... [w]itnesses who are not salaried employees of the Government and who are not in custody ...

and in the second,

> [w]hen a witness is detained in prison for want of security for his appearance, ...

engendered no restriction, but in fact provided for additional allowances. (emphasis added) In its current form, 28 U.S.C. 1821 incorporates specific exclusions where, in subparagraph (d)(1) the subsistence allowance alone is disallowed from an incarcerated witness and in subparagraph (e) there is the in toto exclusion for the alien paroled into the United States for prosecution pursuant to 8 U.S.C. 1182(d)(5) and for the alien deportable pursuant to 8 U.S.C. 1252(b).

The Tenth Circuit interpreted the lack of a definitive expression -- of convicted felon/inmate witness fee exclusion by the Congress in the statute's 1978 reorganization -- as permitting the Circuit to read the amendment by implication, a policy dis-favored by the Court. United States v. Welden, 377 U.S. 95, 103 n.12 (1964). Curiously, the lower court also made the observation that subsections (a)(1) and (b) contained "unqualified wording." (App. "B", majority at 4).

The word "witnesses" appears throughout its legislative and applied statutory history to be non-exclusive of the convicted felon/inmate such as this petitioner, thus illustrating Congress' original intent that the statute be all-witness inclusive. It provided, "... to the witnesses summoned in any court of the United States, the same allowance as is above provided for jurors." Hurtado , supra at 583 n.5 '1973) citing Act of Feb. 28, 1799, c. 19, sec. 6, 1 Stat. 626. (emphasis added).

The elemental language of, and the key to subparagraphs (a)(1) and (b), is use of the letter "a" modifying the word "witness." "A" is: "²a(1)--used as a function word before most singular nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified ..." Webster's Third New International Dictionary 1 (1980), (emphasis added).

The Tenth Circuit majority relied on decisions of three circuit courts and the Court of Claims to hold petitioner ineligible for witness fees: United States v. Garmany, 762 F.2d 929 (1985), cert. denied, 474 U.S. 1062 (1986): In re Grand Jury Matter (Witness

RW), 697 F.2d 103 (3rd Cir. 1982) affirming In re Witness Fees for Prisoner, 533 F.Supp. 401 (E.D. Pa. 1982); Marchese v. United States, 453 F.2d 1268 (Ct.Cl. 1972); and Meadows v. United States Marshal, 434 F.2d 1007 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971). As observed in the Tenth Circuit dissent, "none of those cases contains an analysis of the plain language of the statute or an explanation of why the unambiguous text should not be given effect." (App. "B", dissent at 4).

The Fifth Circuit recognized no authority that explicitly approved witness fees for a federal prisoner and, as the Tenth Circuit in petitioner's claim, elected to use that absence of authority to construct a dis-entitlement. Meadows, supra at 1008. The Court of Claims in 1972 followed the lead of the Meadows court, incorporated their rationale the Congress had suggested a result -- again without explicit language -- and denied the fees entitlement in the context that a prisoner had nothing to lose. Marchese, supra at 1271. These cases were both determined prior to the Court's opinion in Hurtado and the 1978 Congressional amendments to the statute. In 1982, the fee issue came before the Third Circuit in conjunction with a subpoena bringing forth a witness to provide non-testimonial identification in the form of fingerprints. This summoning was to a grand jury, not a criminal trial. In re Witness Fees, supra. Relying on the Meadows and Marchese decisions and construing Hurtado to be limited only to the non-convicted witness, statutory fees were again denied. Witness Fees, supra at 402-03, affirmed In re Grand Jury, supra. Witness Fees advanced the theory of distinction between the

convicted felon/inmate and non-incarcerated witness. Notwithstanding, the rationale, the case cannot be dispositive as this petitioner was summoned to a criminal trial, not merely pretrial and non-testimonial identification grand jury examination. The issue in Garmany, supra, concerned a non-indigent criminal defendant seeking the presence of proposed inmate witnesses from across the federal prison system. This case is distinguished and inapposite from petitioner's claim in that the costs of producing the proposed witnesses exceeded $5,000.00 and involved third parties. In this case, as in all others preceding it, interpretations were read into what was clear statutory language. Only the Third Circuit noted the difficulty engendered by the language of subsections (d)(1) and (e) and the inconclusive legislative history. (App. "B", dissent at 4 citing Witness Fees and its affirming opinion).

The early history respecting prisoner-witness fees is admittedly scant. In the late 1800's case of In re Addis, 28 F. 794 (D.C.S.C. 1886), a defendant in attendance upon court under indictment, under recognizance, who was also under recognizance as a witness in another case was entitled to mileage and witness fees for attendance in the latter case. In a case similar to the facts before this Court in Hurtado, supra, a witness before court in the District of Columbia in 1802 who, for want of surety to appear and testify, was imprisoned and entitled to the daily compensation for his period of imprisonment. Higginson's Case, Fed.Cas.No. 6,471 (D.C.Dist.Col. 1802). Though neither of these two cases establish a mandatory precedent, by lack of inference that prisoners are

excluded from witness fees, a presumption can be adopted that prisoners were in fact included as being eligible for fees without consideration.

To date, no authoritative interpretation has been made on the convicted felon/inmate witness fee entitlement issue left open by the Court in 1973. With dissension between four of the eleven circuits and the Court of Claims with the plain language of the statute, and the absence of case law in the remaining circuits perhaps indicating "that other courts and litigants have not doubted the plain meaning of the statute," In re Stringer, 847 F.2d 549, 551 n.2 (9th Cir. 1988), this issue is ripe for conclusive determination by the Court at this time.

In it's 1978 amendments to 28 U.S.C. 1821, Congress had before it the conclusions made in Marchese v. United States, 453 F.2d 1268 (Ct.Cl. 1972): Meadows v. United States Marshall, 434 F.2d 1007 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971) as well as Hurtado v. United States, 410 U.S. 578 (1973). Nonetheless, the Congress saw fit to not explicitly exclude the convicted felon/inmate and, in incorporating substantially the preexisting phraseology, performed the functional equivalent of codifying its earlier construction. Lorillard v. Pons, 434 U.S. 575, 580-81 (1978). Without the clearly expressed exclusion, the statute's language must be regarded as conclusive. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). This Court has expressed its reluctance to draw inferences from Congress' failure to act, Schneidewind v. ANR Pipeline Co., 485

U.S. 293, ___, 108 S.Ct. 1145, 1154 (1988) and should in this instance re-affirm that principle by ruling that the language means what it says and not as interpreted by vague insinuation in the circuits.

Respecting the incarcerated witness, the Court, in dicta, recognized that separate subparagraphs in the statute created exceptions for subsistence, Hurtado, supra, at 581 and, because the Congress included "'particular language in one section of [the] statute but omit[ted] it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion.'" Russello v. United States, 464 U.S. 16, 23 (1983) quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

"Congress' silence is just that--silence," Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). Its "silence, no matter how 'clanging,' cannot override the words of the statute," and its intent is therefore "best determined by the statutory language that it chooses." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.13 (1985); (App. "B", dissent pp.1, 5).

The Court cannot disregard what Congress plainly and intentionally provided, CIR v. Asphalt Products Co., Inc., 482 U.S. 117, ___, 107 S.Ct. 2275, 2278 (1987), and cannot substitute its statutory construction when that duty properly "belongs to Congress." Hurtado, supra at 591.

The Tenth Circuit was obligated to defer to Congress and to apply the plain and ordinary meaning of words, rather than a hypothesize with speculation when the words themselves are clear. Palestine Information Office v. Shultz, 674 F.Supp. 910, 917 (D.D.C. 1987). Further, "if the language of a statute is clear, that language must be given effect--at least in the absence of a patent absurdity. (citations omitted). Judges interpret laws rather than reconstruct the legislators' intentions. Where the language of those laws is clear, [the Tenth Circuit was] not free to replace it with an unenacted legislative intent." I.N.S. v. Cardoza Fonseca, 480 U.S. 421, ___, 107 S.Ct. 1207, 1224 (1987) (Scalia, J., concurring). There is no "patent absurdity" in the instant case and, "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" United States v. Ron Pair Enterprises, Inc., ___ U.S. ___, ___, 109 S.Ct. 1026, 1030 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917).

The gist of the applicable canon of statutory construction that should be followed by this Court is:

> [p]rovisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law ...
>
> ... Words and provisions used in the original act or section are presumed to be used in the same sense in the amendment. Moreover, the legislature is presumed to know the prior construction of the original act, and if words or provisions in the act or section amended that had been previously construed are repeated in the amendment, it is held that the legislature adopted the prior construction of the word or provision.

IA C. Sands, Sutherland on Statutory Construction, sec. 22.33 (4th ed. 1985).

There are numerous presumptions attached to the construction of a statute: presumptions supporting reversal of the instant opinion. See, e.g., 82 C.J.S. Statutes, sec. 316 (1953), where presumptions include:

> [t]hat a legislature, in passing a statute, knew its own intention, and knew the rules of statutory construction, and that the act, when couched in unambiguous language, fully expresses that intention. It has also been presumed that the legislature acted with deliberation, with knowledge of the effect of its act, and with a purpose in view, and that the provisions of the act were formulated in harmony therewith.
>
> It is also presumed that the legislature had, and acted with respect to, full knowledge and information as to the subject matter of the statute and the existing conditions and relevant facts relating thereto, as to prior and existing law and legislation on the subject of the statute and the existing condition thereof, as to the judicial decisions with respect to such prior and existing law and legislation, and as to the construction placed on the previous law by executive officers acting under it; and a legislative judgment is presumed to be supported by facts known to the legislature, unless facts judicially known or proved preclude that possibility.
>
> . . .
>
> So, also, presumptions are indulged against contradictory provisions or enactments, or uncertainty, or inadvertent omissions or oversights ...

See also, e.g., Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

The Tenth Circuit majority opined concerns for the potential abuse by the specific class, inmate witnesses, some members of which might testify for the sole purpose of illegitimate financial gain, (App. "B", majority at 6-7); a point recognized in dissent. (App.

"B", dissent at 6). These concerns do not fall as the task of a court to correct, but "belongs to Congress, not us." (App. "B", dissent, Id.). The mere fact that some additional measure dreamed up by the Court -- i.e., the general suppression of inmate witness fee eligibility based on an empirically hypothetical misuse -- would further an objective of the statute does not mean that, in enacting the statute, Congress intended to adopt the additional measure. Chilkat Indian Village v. Johnson, 643 F.Supp. 535, 537 (D. Alaska 1986). The position taken by the Tenth Circuit in this case manifests a flagrant repudiation of the standards set by this Court regarding the application of statutes as opposed to invoking their own views of the governing standards set forth in clear and unambiguous language.

Thus, the cases determined prior to the 1978 amendment were considered by Congress: the lack of further expressed intent in amendatory statutory language was not inadvertent: there was no ambiguity: the resulting language was with the full knowledge and information beforehand: and there remains nothing to interpret as to meaning or intent by the courts as th language is plain. Payment of $30.00 per day is mandated by statute for that period in court and testifying, waiting to testify, and en route to and from court for the purpose of testifying.

CONCLUSION

The petition for a writ of certiorari should be granted to answer the question: Is a material witness who is a convicted felon in physical custody in a state or federal prison -- entitled to the same witness fee allowance as a material witness who is not a convicted felon, but otherwise detained, pursuant to 28 U.S.C. 1821(a)(1) and (b)?

Respectfully submitted

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CERTIFICATE OF SERVICE/MAILING

The Petitioner above, Richard S. Demarest, certifies that pursuant to S.C.R. 28.4(a) a true and correct copy of the above Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, by deposit of same in the United States Mail Depository at the Arkansas Valley Correction Facility, Crowley, Colorado, postage prepaid, on the 26th day of October, 1989.

Richard S. Demarest

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD DEMAREST,

Petitioner-Appellant,

v.

JAMES MANSPEAKER, Clerk of the United States District Court for the District of Colorado, et al.,

Respondents - Appellees.

No. 88-1899

FILED
United States Court of Appeals
Tenth Circuit
OCT 23 1989
ROBERT L. HOECKER
Clerk

ORDER

Before LOGAN and EBEL, Circuit Judges, and COOK, District Judge.*

*Honorable H. Dale Cook, Chief Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

PUBLISH

FILED
United States Court of Appeals
Tenth Circuit
SEP 5 - 1989
ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RICHARD DEMAREST, Petitioner-Appellant, v. JAMES MANSPEAKER, Clerk of United States District Court for the District of Colorado; and CATHY, Last Name Unknown, Defendants-Appellees.	)	No. 88-1899 (C. No. 88-F-843) (D. Colorado)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD BROOKS TIPPETT, Defendant, EDGAR LEE DURRE, Movant-Appellant.	)	No. 88-1972 (D.C. No. 87-CR-386) (D. Colorado)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD BROOKS TIPPETT, Defendant, RONALD REESE, Movant-Appellant.	)	No. 88-1973 (D.C. No. 87-CR-386) (D. Colorado)

IN THE MATTER OF GRAND JURY Y-87-1, of the Subpoena of RONALD REECE, Movant-Appellant.	)	No. 88-2782 (D.C. No. 88-Y-114) (D. Colorado)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD BROOKS TIPPETT, Defendant, ELIZABETH DURRE, Movant-Appellant.	)	No. 88-2327 (D.C. No. 87-CR-386) (D. Colorado)

Submitted on the Briefs:

Richard S. Demarest, Edgar Lee Durre, Ronald L. Reece, and Elizabeth Dufre, pro se.

Michael J. Norton, United States Attorney, and Douglas W. Curless, Assistant United States Attorney, Denver, Colorado, for the United States.

Before LOGAN and EBEL, Circuit Judges, and COOK, District Judge.*

LOGAN, Circuit Judge.

The issue presented in these consolidated appeals is whether appellants, who are incarcerated for criminal offenses, either in federal or state institutions, are entitled to witness fees

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* The Honorable H. Dale Cook, Chief Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

pursuant to 28 U.S.C. § 1821 for testifying in separate criminal proceedings before a federal court or grand jury. We hold that they are not, and therefore affirm the judgments from which these appeals were taken.[1]

In pertinent part, 28 U.S.C. § 1821 provides as follows:

> "(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> . . .
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> . . .
>
> (d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
>
> . . .
>
> (4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section."

Appellants contend that the plain language of subsections (a)(1) and (b) mandate the payment of attendance fees to a witness,

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

regardless of whether or not that person is incarcerated. They also point to the qualifying language regarding incarcerated individuals contained in subsection (d)(1) and argue that Congress would have included similar language in subsection (a)(1) or (b) had it intended to preclude prisoners from receiving the fee. On its face, this is an appealing argument.

We note, however, that there is another plausible reading of the statutory language and reason for the reference to incarceration in subsection (d)(1). When Congress referred to incarcerated witnesses in subsection (d)(1) it could have intended to clarify what was impliedly set forth in (d)(4)--that an individual incarcerated under the material witness statute, 18 U.S.C. § 3144 (formerly 18 U.S.C. § 3149), is not to receive a subsistence allowance "in addition to his subsistence." 28 U.S.C. § 1821(d)(4).

Despite the unqualified wording of subsections (a)(1) and (b), strong evidence exists to support the view that Congress never intended § 1821 to apply to individuals incarcerated for criminal acts. Since at least the year 1900, the Teasury Department has taken the position that imprisoned individuals, other than those detained as a material witness, are not entitled to witness fees. In re Witness Fees for Prisoner, 533 F. Supp. 401, 403 & n.5 (E.D. Pa.) (citing 6 Dec. Comp. Treas. 588, 588 (1900)), aff'd per curiam sub nom. In re Grand Jury Matter (Witness RW), 697 F.2d 103, 104 (3d Cir. 1982); Marchese v. United

States, 453 F.2d 1268, 1271 (Ct. Cl. 1972).[2] In 1970 and 1972, despite the existence of similar qualifying language regarding incarcerated individuals contained in the then-existing counterpart to current subsection (d)(1),[3] two different federal appellate courts ruled that § 1821 did not entitle criminal inmates to witness attendance fees. Meadows v. United States Marshal, 434 F.2d 1007 (5th Cir. 1970) (per curiam); Marchese, 453 F.2d at 1271.

Six years after the Marchese decision, in 1978, Congress substantially reorganized § 1821 into its current form. Nowhere in the express language of the revisions or in the legislative history did Congress indicate criminal inmates, other than material witnesses detained for want of security for his appearance, were entitled to a witness fee. Had Congress meant to change the existing judicial and administrative interpretations of § 1821, it surely could have done so in more express terms. Cf. FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437 (1986) ("When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is

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[2] In addition to their statutory language arguments, plaintiffs rely on Hurtado v. United States, 410 U.S. 578 (1973) (incarcerated material witnesses entitled to attendance fee for number of days detained during trial), to support their position. We agree with the In re Witness Fees court, for the reasons stated therein, that Hurtado is inapposite to the present case. See 533 F. Supp. at 402-03.

[3] The incarceration provision of old § 1821 provided that "[w]itnesses . . . who are not in custody" were entitled to a subsistence allowance. The other pertinent provisions of old § 1821, including the attendance fee provision, are substantially similar to current § 1821, although significantly restructured.

persuasive evidence that the interpretation is the one intended by Congress.'" (quoting NLRB v. Bell Aerospace, 416 U.S. 267, 275 (1974)). Moreover, since the 1978 amendment, other courts have rejected the appellants' interpretation of § 1821, United States v. Garmany, 762 F.2d 929, 933 n.2 (11th Cir. 1985); In re Grand Jury Matter, 697 F.2d at 104, as has the Department of Justice Regulations. See 28 C.F.R. § 21.4(d) (published May 1, 1986) ("A witness in custody for purposes other than 18 U.S.C. 3149 [now § 3144] is ineligible to receive the attendance and subsistence fees provided by this section.").

Other compelling reasons support the view that incarcerated prisoner witnesses should not receive fees for their appearances. First, Congress expressly stated that the 1978 revision of § 1821 was necessary because existing witness fees and allowances "no longer compensate[d] the average witness for the actual costs which witness service entails." H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. Code Cong. & Ad. News 4631. Beyond their loss of the very modest compensation they might receive from participating in prison job programs, prisoners generally do not incur financial costs serving as a witness. They are transported at the expense of the government, accompanied by government-paid security personnel. Second, if inmates were to receive a $30 fee for every day they attend court to serve as a witness, which is much more than they make working in prison industries, it is not difficult to imagine the potential abuses that might result. There would be greater temptation to file suits and subpoena friends among inmates as witnesses, not only

for the trip they would receive outside the prison, but for the profit from the witness fee.

AFFIRMED.

EBEL, Circuit Judge, dissenting:

In my view, the majority mistakenly has relied upon congressional silence and upon the majority's own policy desires to abrogate the plain language of the statute. It is wrong to use the silence of legislative history to contradict or modify unambiguous text: "[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.13 (1985). Moreover, although I do not quarrel with the majority's policy concerns, those arguments must be addressed to Congress rather than this court. We have no authority to modify the plain language of a statute based upon what we wished it said: "[N]o matter how unwise or unsatisfactory the . . . [statutory provision], the Constitution provides no license to impose . . . [other terms] we might think fair and just. That task belongs to Congress, not to us." Hurtado v. United States, 410 U.S. 578, 591 (1973). Accordingly, I dissent.

The language of 28 U.S.C. § 1821 is clear and unambiguous. Subsection (a)(1) provides that "a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section." (Emphasis added.) Nothing in the statute states that "a witness" excludes witnesses who happen to be prisoners.

If there were any doubt as to whether "a witness" includes incarcerated witnesses, subsection (d)(1) settles the matter.

That section provides that a witness who is not incarcerated is entitled to receive an additional subsistence allowance when the witness is required to stay overnight:

> A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

28 U.S.C. § 1821(d)(1) (emphasis added).

Subsection (d)(1) necessarily assumes that the phrase "a witness" includes "a witness who is incarcerated" because Congress felt it necessary in subsection (d)(1) expressly to carve out incarcerated witnesses from the phrase "a witness" when Congress did not want to include incarcerated witnesses. Thus the phrase "a witness" contained in subsection (a)(1), which does not carve out incarcerated witnesses, likewise must include "a witness who is incarcerated." No other reading is possible without ignoring the text's plain language or divorcing the statute's subsections from each other.

Further, subsection (e) provides the one and only category of persons who are not entitled to receive witness attendance fees under subsection (a)(1) -- illegal aliens.[1] Thus, Congress plainly knew how to exclude expressly a class of persons from the

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[1] 28 U.S.C. § 1821(e) provides:

> An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

broad category of "witnesses" who are entitled to attendance fees, and Congress did so. But that exclusion did not encompass prisoners (other than, presumably, alien prisoners).

In response, the majority presents four arguments for its view that Section 1821 does not mean what it says.

First, the majority contends that the reference to "a witness who is incarcerated" in subsection (d)(1) might refer only to a witness who is "detained" pursuant to the material witness statute described in subsection (d)(4).[2] The problem with that argument is that subsection (d)(1) says nothing of the sort. Subsection (d)(1) does not mention the material witness statute, but rather refers to all witnesses who are "incarcerated." In contrast, subsection (d)(4) does refer specifically to the material witness statute and uses the narrower phrase "witness [who] is detained" rather than subsection (d)(1)'s broader phrase "witness who is incarcerated." Thus, there is no statutory indication that Congress intended the reference to "a witness who is incarcerated" in subsection (d)(1) to mean only "a witness [who] is detained" pursuant to the material witness statute described in subsection (d)(4). Indeed, the language of the two subsections indicates just the opposite.[3]

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[2] 28 U.S.C. § 1821(d)(4) provides:

> When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

[3] Moreover, the majority's view that subsection (d)(1)'s

[Footnote continued . . .]

Second, the majority relies upon the decisions of three circuit courts and the Court of Claims holding that prisoners are not entitled to witness fees.[4] However, none of those cases contains an analysis of the plain language of the statute or an explanation of why the unambiguous text should not be given effect. The district court's opinion affirmed by the Third Circuit, In re Witness Fees for Prisoner, 533 F. Supp. 401 (E.D. Pa.), aff'd sub nom. In re Grand Jury Matter (Witness RW), 697 F.2d 103 (3d Cir. 1982), at least mentioned the difficulty engendered by the language of subsections (d)(1) and (e). 533 F. Supp at 402. But the district court in that case, although acknowledging that the "legislative history . . . is inconclusive," concluded nonetheless that "Congress did not intend witness fees to be paid to prisoners." Id. The court presented no justification for that conclusion. Moreover, the conclusion contradicts the Supreme Court's later teaching that, "[g]iven the

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[. . . footnote continued]
exclusion of "incarcerated" witnesses refers only to witnesses who are "detained" under subsection (d)(4), produces an illogical result under the literal terms of the statute. Under that view, subsection (d)(1)'s reference to "a witness" would include all prisoners except "detained" prisoners under Section 3149 (now Section 3144), and thus most prisoners would be entitled to subsistence allowances in addition to attendance fees. It makes little sense to give subsistence allowances to ordinary prisoners when their subsistence needs already are being provided at taxpayer expense, and that result seems at odds with the policy benefits sought in the majority opinion.

[4] United States v. Garmany, 762 F.2d 929, 933 n.2 (11th Cir. 1985), cert. denied, 474 U.S. 1062 (1986); In re Grand Jury Matter (Witness RW), 697 F.2d 103, 104 (3d Cir. 1982) (affirming In re Witness Fees for Prisoner, 533 F. Supp. 401, 403 (E.D. Pa. 1982)); Marchese v. United States, 453 F.2d 1268, 1271 (Ct. Cl. 1972); Meadows v. United States Marshal, 434 F.2d 1007, 1008 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971).

plain words of the statute," Congress' intent is "best determined by the statutory language that it chooses." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 n.13 (1985).

Third, the majority asserts that Congress must have intended to adopt those other courts' interpretation of the statute because Congress has not substantively changed Section 1821 for many years: "Nowhere in the express language of the revisions [to Section 1821] or in the legislative history did Congress indicate criminal inmates . . . were entitled to a witness fee." (Maj. Op. at 5; emphasis added.) But the majority disregards the fact that the "express language" of the statute already unequivocally entitles witnesses, with no exclusion of "incarcerated" witnesses, to obtain witness attendance fees. It is difficult to fault Congress for failing to revise what already is clear. Again, "congressional silence, no matter how 'clanging,' cannot override the words of the statute." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.13 (1985).[5]

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[5] The majority cites FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437 (1986), but that case has little to do with this one. In Philadelphia Gear, Congress expressly adopted the FDIC's definition of a key term -- "deposit" -- that was contained in the FDIC's organic statute. Unlike Philadelphia Gear, no administrative determination requiring special deference is involved here, and Congress has not changed Section 1821 to adopt the interpretation of an agency or court. Nor is this case like Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982). In Curran, the Court held that an implied private right of action under the Commodity Exchange Act should be preserved when (1) Congress conducted a comprehensive reexamination and amendment of the Act and left intact the provisions under which numerous federal courts previously had implied a private right of action, and (2) the legislative history of the subsequent amendments indicated that Congress intended to preserve the private remedy. 456 U.S. at 381-82, 384-88. Here, unlike the situation in Curran, the prior interpretation of the
[Footnote continued . . .]

Fourth, the majority suggests that there are policy reasons militating against giving witness attendance fees to prisoners. The majority's concerns center on the fact that current attendance fees are higher than inmates' prison salaries, and consequently there is the potential for abuse. I do not dispute the legitimacy of those concerns, although I believe that district courts have the means -- such as taking testimony by telephone or through depositions, or by imposing appropriate sanctions on abusive parties -- to minimize the problem. But even if I were to agree that the statute as written is misguided, that is no reason to overturn it by judicial fiat. The task of divining good policy "belongs to Congress, not to us." Hurtado v. United States, 410 U.S. 578, 591 (1973).[6]

In conclusion, this is not an instance in which a statute produces an "unfathomable" result and "can't mean what it says." Green v. Bock Laundry Machine Co., ___ U.S. ___, 109 S. Ct. 1981, 1895, 104 L. Ed. 2d 557, 565 (1989). Section 1821 is neither

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[. . . footnote continued]
statute by other federal courts flatly contradicts the statute's plain language (as opposed to extending it), and there is no legislative history indicating that Congress intended to adopt those courts' interpretation.

[6] It would be interesting to know whether there are any other categories of witnesses, besides prisoners, whom the majority would bar from receiving statutorily mandated fees and allowances. Can convicted criminals sentenced to government-supported "half-way houses" receive them? Convicted criminals sentenced to probation? Parolees? Residents of government-supported mental institutions? Government employees? Minor children? The point is that the majority nowhere explains why prisoners are to be excluded from the statute when other persons in potentially analogous situations are not. The inherent difficulty in making distinctions among categories of witnesses, especially in the face of an unambiguous, unrestricted statute, is itself a reason why the creation of those distinctions should be left to Congress.

internally inconsistent nor facially ambiguous. Under a plain reading of the statute, prisoners serving as witnesses are entitled to attendance fees but not to subsistence allowances. That result is neither illogical nor irrational. There is no legislative history showing conclusively that the statute does not mean what it says. Consequently, I would reverse the district court's judgments in these consolidated appeals and would hold that prisoners, like other witnesses, are entitled to witness attendance fees under Section 1821.